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DAVID L. LEVIN, Appellant)	
)	
and)	Docket No. 05-768
)	Issued: July 20, 2005
DEPARTMENT OF THE NAVY, PEARL)	
HARBOR NAVAL SHIPYARD, HI, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

On February 15, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decisions dated September 2 and November 2, 2004, which denied his request for reconsiderations on the grounds that the requests were not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated December 20, 2002 to the filing of this appeal on February 15, 2005 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

¹ According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that his requests were untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on appeal on four occasions. In a July 10, 1989 decision, the Board found that the impartial medical examiner's report was insufficient to constitute the weight of the medical opinion evidence as it lacked rationale and was not based on a proper factual background and did not establish that appellant, an apprentice marine machinist, could return to his date-of-injury position.² The Board determined that the Office failed to meet its burden of proof to terminate appellant's compensation benefits. Following this decision, the Office reinstated appellant's compensation benefits and again terminated these benefits by decision dated January 26, 1998. The Board affirmed the Office's decision on June 16, 2000.³ The Board further found in the June 16, 2000 decision that appellant had failed to establish entitlement to continuing compensation benefits on or after February 1, 1998, the date the Office terminated his benefits.

Following the Board's June 16, 2000 decision, appellant submitted additional medical evidence and requested reconsideration. By decision dated December 18, 2000, the Office denied this request as untimely and found that appellant had failed to submit clear evidence of error. Appellant appealed this decision to the Board by letter dated March 16, 2001. In an Order Granting Remand dated September 18, 2001,⁴ the Board granted the Director's motion to remand appellant's claim for the Office to consider whether to reopen appellant's claim on the merits.

In a decision dated November 15, 2001, the Office denied modification of the June 16, 2000 decision of the Board, finding that the medical evidence submitted was insufficient to overcome the weight the impartial medical examiner, Dr. Bruce E. Bradley, a Board-certified orthopedic surgeon. Appellant requested reconsideration on January 22, 2002 and, by decision dated April 12, 2002, the Office again denied modification of its prior decisions. Appellant requested review by the Board. By decision dated December 20, 2002,⁵ the Board found that reports of Dr. Bradley J. Watters, a Board-certified orthopedic surgeon, were not based on a complete medical history and did not provide an opinion regarding appellant's ability to perform his date-of-injury position. The Board concluded that these reports were not sufficient to either establish appellant's burden of proof of continuing disability on or after February 1, 1998 or to create a conflict with the reports of Dr. Bradley. The Board also found that appellant had no more than 12 percent permanent impairment of his left lower extremity. The Board affirmed the November 15, 2001 and April 12, 2002 decisions of the Office and remanded the case for further

² 40 ECAB 1076 (1989).

³ Docket No. 99-1019, issued June 16, 2000.

⁴ Docket No. 01-1194, issued September 18, 2001.

⁵ Docket No. 02-1925, issued December 20, 2002.

development regarding appellant's entitlement to additional medical benefits. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

The Office undertook further development of the medical evidence and determined that appellant had an additional 10 percent permanent impairment of his left lower extremity entitling him to a schedule award. The Office granted appellant an additional schedule award for 10 percent on April 15, 2003 increasing the permanent impairment rating to 22 percent of the left lower extremity.

In a report dated June 2, 2003, Dr. Watters diagnosed traumatic arthritis in appellant's left knee and stated that he could not return to work as a marine machinist. He stated that appellant had been unable to perform the duties of a marine machinist since 1982.

Appellant requested continuing compensation for wage loss on June 25, 2003. On October 31, 2003 appellant requested reconsideration based on his entitlement to continuing disability and compensation for loss of wage-earning capacity from January 1998 relying on Dr. Watter's report.

By decision dated December 10, 2003, the Office declined to reopen appellant's claim for further consideration of the merits stating that the record did not contain new medical evidence.

Appellant again requested reconsideration on December 12, 2003 based on Dr. Watter's June 2, 2003 letter. By decision dated January 16, 2004, the Office found that the evidence submitted was not sufficient to warrant merit review as the evidence was cumulative.

Dr. Watters completed a report on January 21, 2004 and noted that appellant continued to protest that he was entitled to additional wage-loss compensation. He stated that appellant was not under his care in 1998 and that disability was not his area of expertise.

Appellant requested that the Board review the Office's January 16, 2004 decision on April 19, 2004. He requested reconsideration from the Office on May 26, 2004 and submitted a report dated May 13, 2004 from Dr. William T. Thieme, a Board-certified orthopedic surgeon. Dr. Thieme stated that he had reviewed appellant's date-of-injury position description and performed a physical examination. He diagnosed mild post-traumatic degenerative arthritis of the left knee. Dr. Thieme stated, "Because of the degenerative arthritis on the left knee apparent on x-ray, which is accompanied by symptoms consistent with the radiographic change, it is my opinion that the patient is not capable of sustaining some of the repetitive work activities described in the job description. In particular, I believe he is not capable of kneeling, crouching, crawling and climbing in cramped and awkward work positions." He noted that this inability to work was present on his initial examination on March 20, 2003.

In an Order Dismissing Appeal dated July 17, 2004,⁶ the Board noted that on July 7, 2004 appellant requested that his appeal be dismissed to pursue reconsideration before the Office. The Board dismissed appellant's appeal in accordance with his request.

⁶ Docket No. 04-1368, issued July 17, 2004.

By decision dated September 2, 2004, the Office found that appellant's May 26, 2004 request for reconsideration was not timely filed within one year from the most recent merit decision on the issue of disability, the December 20, 2002 decision. The Office further found that Dr. Thieme's May 13, 2004 report was not sufficient to establish clear evidence of error in the prior decisions.

Appellant again requested reconsideration on September 13, 2004 and alleged that his request was within one year from the December 10, 2004 decision. He alleged that the Board's December 20, 2002 decision was "rescinded and remanded back ... for not being in posture with accepted facts." By decision dated November 2, 2004, the Office again found that appellant's request for reconsideration was not timely filed and that he did not submit clear evidence of error in support of his reconsideration request.⁷

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁸ does not entitle a claimant to a review of an Office decision as a matter of right.⁹ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹⁰ The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹¹ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹²

The Office's regulations require that an application for reconsideration must be submitted in writing¹³ and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."¹⁴ The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its

⁷ Following the Office's November 2, 2004 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁸ 5 U.S.C. § 8128(a).

⁹ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

¹⁰ *Id.* at 768; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

¹¹ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

¹² 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 9 at 769; *Jesus D. Sanchez*, *supra* note 10 at 967.

¹³ 20 C.F.R. § 10.606.

¹⁴ 20 C.F.R. § 10.605.

most recent decision. The application must establish, on its face that such decision was erroneous.”¹⁵

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁸ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.²¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office’s decision.²² The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.²³

ANALYSIS

Appellant requested reconsideration on May 26, 2004 alleging that he was entitled to wage-loss compensation due to his accepted employment injury. The Board issued the most recent merit decision on this issue on December 20, 2002 and found that appellant had not met his burden of proof in establishing any entitlement to continuing disability compensation on or after February 1, 1998, the date the Office terminated his wage-loss and medical benefits. As

¹⁵ 20 C.F.R. § 10.607(b).

¹⁶ *Thankamma Mathews*, *supra* note 9 at 770.

¹⁷ *Id.*

¹⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁹ *Jesus D. Sanchez*, *supra* note 10 at 968.

²⁰ *Leona N. Travis*, *supra* note 18.

²¹ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

²² *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²³ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

appellant's request for reconsideration was not filed within one year of the date of the most recent merit decision, it was not timely filed.²⁴

In its September 2, 2004 decision, the Office properly found that the May 13, 2004 report of Dr. Thieme, a Board-certified orthopedic surgeon, did not establish clear evidence of error in the December 20, 2002 merit decision. Dr. Thieme opined that appellant was not currently capable of performing the duties of his date-of-injury position of marine machinist. He diagnosed mild post-traumatic degenerative arthritis of the left knee. Dr. Thieme stated that appellant was not capable of sustaining some of the repetitive work activities described in his job description. He found that appellant was not capable of kneeling, crouching, crawling and climbing in cramped and awkward work positions. Dr. Thieme noted that this inability to work was present on his initial examination of appellant on March 20, 2003. While Dr. Thieme's report has detailed findings and offers an opinion regarding appellant's current ability to perform his date-of-injury position, it is not based on a sufficiently detailed history of injury to shift the weight of opinion in favor of appellant or to overcome the weight attributed to Dr. Bradley, a Board-certified orthopedic surgeon, as the impartial medical examiner. As noted above, to show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.²⁵ In this case, Dr. Thieme's finding of disability for work is not sufficient to create a conflict with the opinion of the impartial medical examiner, Dr. Bradley, who found that appellant had no disability for work as a result of his accepted employment injury. As the evidence does not shift the weight of the evidence and raise a substantial question as to the correctness of the merit decision, this report does not establish clear evidence of error and is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

In his second untimely request for reconsideration on September 13, 2004 appellant alleged that his requests for reconsideration were timely based on the December 10, 2003 decision of the Office. In the December 10, 2003 decision, the Office clearly stated that it had not reviewed the review of the merits of appellant's claim. As this is not a merit decision, the right to request reconsideration within a year does not accompany this decision.²⁶ Consequentially, neither appellant's May 26, 2004 nor his September 13, 2004 requests for reconsideration are timely filed within one year of the December 20, 2002 merit decision.

In support of his untimely September 13, 2004 request for reconsideration, appellant argued that his physician's disagreed with Dr. Bradley and that the Board's December 20, 2002 decision was "rescinded and remanded back ... for not being in posture with accepted facts." This statement regarding the Board's December 20, 2002 decision is not accurate and not a basis for arguing clear evidence of error. The Board remanded appellant's claim back to the Office to

²⁴ See *supra* note 11.

²⁵ Leon D. Faidley, Jr., *supra* note 22.

²⁶ *Supra* note 11.

issue a decision regarding his entitlement to continuing medical treatment,²⁷ not for additional development of his disability for work. As appellant has not submitted any evidence of error in his September 13, 2004 request for reconsideration, the Office properly declined to reopen appellant's claim for consideration of the merits on November 2, 2004.

CONCLUSION

The Board finds that appellant's requests for reconsideration on May 26 and September 13, 2004 were not timely filed and did not submit evidence establishing clear evidence of error. The Board finds that the Office properly declined to reopen appellant's claim for reconsideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 2 and September 2, 2004 are affirmed.

Issued: July 20, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁷ The Office has not issued a final decision on this issue and the issue is not in posture for review by the Board. 20 C.F.R. § 501.2(c).